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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DESHAWN D. LESLIE, Defendant and Appellant.	B206632 (Los Angeles County Super. Ct. No. TA091536)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Deshawn D. Leslie appeals from the judgment entered following a jury trial that resulted in his conviction for first degree murder. Leslie was sentenced to a prison term of 50 years to life, plus a consecutive life term. Leslie contends the trial court committed instructional errors. Discerning no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence relevant to the issues presented on appeal established the following. Leslie was a member of the Tree Top Piru criminal street gang. Leslie's cousin, known by the moniker "Day-Day," and William Domonque Davis, known as " 'Y.G. Will,' " were also members of the gang. The Segundos, a Hispanic gang, and the Tree Top Piru gang were rivals. Enemies of the Segundo gang referred to them as "goonies," a derogatory term. Segundo gang members were known for wearing blue baseball caps, with the bill to the side.

On April 22, 2006, Day-Day was shot and wounded.[1] Members of the Tree Top Piru gang believed the shooter was a Segundo gang member. That night, Davis asked Leslie to drive him around so he could "look and see if anybody [was] out." Leslie complied. A second vehicle, driven by another gang member, followed behind Leslie's car. Leslie drove down Lime Avenue in Compton, an area claimed as the territory of the Segundo gang. Davis was armed with a .9-millimeter Luger firearm.

Victim Ivan Nieves, who was Latino, was seated in his red Mustang on Lime Avenue, wearing a blue Dodgers baseball cap, when Leslie traveled down the street. Nieves was not a member of any criminal street gang. A party was in progress across the street. Leslie parked his car in front of Nieves's vehicle. Leslie knew Davis was going to "bang on him and ask him where he was from," i.e., challenge Nieves by asking for his

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[1] Day-Day was subsequently shot and killed in July 2006.

gang affiliation. Davis exited the car, walked over to Nieves's vehicle, and fired numerous rounds at Nieves.[2] Eight shots hit Nieves, killing him. Forensic testing revealed that at least one of the bullets was fired from a German, .9-millimeter Luger pistol. Davis shot Nieves because he mistakenly believed Nieves was a member of the Segundo gang, which was responsible for Day-Day's shooting. Leslie later learned that Day-Day had been shot by a Fruit Town gang member, not a Segundo gang member.

2. *Procedure.*

Trial was by jury. Leslie was convicted of first degree murder (Pen. Code, § 187, subd. (a)).[3] The jury found a principal personally and intentionally used and discharged a firearm, causing Nieves's death (§ 12022.53, subds. (b), (c), & (d)), and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The trial court sentenced Leslie to 50 years to life in prison, plus a consecutive life term. It imposed a victim restitution award, a restitution fine, a suspended parole restitution fine, and a court security assessment. Leslie appeals.

DISCUSSION

1. *The trial court did not err by failing to sua sponte give a unanimity instruction.*

The People argued Leslie could be found guilty of first degree murder either as an aider and abettor, or under a conspiracy theory. Defense counsel did not request, and the trial court did not give, a unanimity instruction. Leslie now asserts that the failure to give such an instruction was prejudicial error. We are unconvinced.

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[2] Leslie described the crime to police during two audiotaped interviews occurring in November 2006 and June 2007. Leslie told police he had not known Davis was armed or intended to shoot anyone. According to Leslie, he was going to show Davis where the "goonies" lived, and Davis would return later without Leslie.

[3] All further undesignated statutory references are to the Penal Code.

A jury verdict must be unanimous in a criminal case. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Jurors must unanimously agree the defendant "is criminally responsible for '*one discrete criminal event.*' [Citation.]" (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850.) Therefore, "when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo, supra,* at p. 1132.) For example, where there is evidence of acts that can be charged as separate offenses, the unanimity instruction typically must be given. (*People v. Maury* (2003) 30 Cal.4th 342, 422.) Where required, a unanimity instruction must be given sua sponte. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274-275.)

"On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*People v. Russo, supra,* 25 Cal.4th at p. 1132; *People v. Benavides* (2005) 35 Cal.4th 69, 101; *People v. Carlin* (2007) 150 Cal.App.4th 322, 347 [where "the prosecution presents multiple theories regarding one criminal act or event, a unanimity instruction is not required"].) "This rule of state law passes federal constitutional muster." (*People v. Benavides, supra,* at p. 101.)

Thus, a unanimity instruction is not required concerning the elements of a charged offense (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 59), or concerning whether the defendant was the direct perpetrator or an aider and abettor, so long as it is unanimous that he was one or the other. (*People v. Wilson* (2008) 44 Cal.4th 758, 801.) Likewise, a jury need not unanimously agree which specific action satisfies the "overt act" element of a conspiracy charge, as long as jurors agree that at least one overt act was committed. (*People v. Russo, supra,* 25 Cal.4th at pp. 1134-1135; *People v. Carlin, supra,* 150 Cal.App.4th at p. 347.) Significantly here, " '[i]t is well settled that, to properly convict, a jury must unanimously agree that the defendant is guilty of the statutory offense of first degree murder beyond a reasonable doubt, but it need not decide which of several

proffered theories of first degree murder liability governs the case.' [Citation.]" (*People v. Wilson, supra,* at p. 801; see also *People v. Whisenhunt* (2008) 44 Cal.4th 174, 222; *People v. Zamudio* (2008) 43 Cal.4th 327, 362-363; *People v. Millwee* (1998) 18 Cal.4th 96, 160-161.)

Applying these principles here, it is readily apparent that there was no instructional error. Although the People presented two theories by which Leslie could be found guilty of first degree murder, there was but a single, discrete act of murder at issue. There was therefore no danger the jury might disagree on which act formed the basis for the crime. There was no possibility some jurors would conclude Leslie aided and abetted, or conspired, to commit one murder, while others concluded he was guilty of commission of a different murder. (See *People v. Russo, supra,* 25 Cal.4th at pp. 1134-1135; *People v. Benavides, supra,* 35 Cal.4th at p. 101.) Because the evidence showed only one criminal act – the murder of Nieves – a unanimity instruction was not required.

People v. Davis (2005) 36 Cal.4th 510, and *People v. Norman* (2007) 157 Cal.App.4th 460, cited by Leslie, do not assist him. In *Davis,* the defendant was charged with robbery, as well as murder. The prosecution presented evidence of "two distinct acts of robbery," i.e., the taking of the victim's car and the taking of her rings. Under these circumstances, the jury should have been instructed that it must unanimously agree on which act constituted the robbery. (*People v. Davis, supra,* at pp. 560-561.) In *Norman,* the defendant was convicted of theft. The evidence showed that he committed two separate thefts, i.e., one theft of mail found in a stolen car, and another theft of mail from an apartment complex. The prosecution did not make an election as to which act constituted the charged theft and, during closing argument, the prosecutor argued that both thefts supported the charge. (*People v. Norman, supra,* at p. 465.) Because the "evidence supported more than one discrete crime of theft and the prosecution not only failed to elect among the crimes, but actually argued both to the jury," a unanimity instruction was required. (*Id.* at p. 466.) In sharp contrast to these cases, however, there was no evidence of two distinct murders in the instant case. *Davis* and *Norman* are therefore inapposite.

2. *The trial court's instruction on aiding and abetting adequately informed the jury that specific intent was required.*

Leslie next complains that the trial court erred by failing to instruct the jury that to be guilty as an aider and abettor, specific intent was required. We disagree that instructional error occurred.

a. *Additional facts.*

The jury was instructed with CALCRIM No. 401, regarding aiding and abetting. As given here, the instruction provided in pertinent part: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him an aider and abettor."

Additionally, the jury was instructed with CALCRIM No. 225, which stated, "[t]he People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent and/or mental state. The instruction for each crime and allegation explains the intent and/or mental state required." The jury was also instructed on the elements of first degree murder, including that the defendant must have had the intent to kill. Another instruction advised that the instructions must be considered as a whole.

b. *Discussion.*

"Under California law, a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; § 31; *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117.) Therefore, "a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. [Citation.]" (*People v. McCoy*, *supra*, at p. 1117.) A defendant can be liable as an aider and abettor in two ways. "First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.]" (*Ibid.*) In the instant case, the People did not rely upon a natural and probable consequences theory, nor did the trial court instruct the jury regarding the natural and probable consequences doctrine.

When the offense charged is a specific intent crime, the accomplice must share the specific intent of the perpetrator. "What this means here, when the charged offense and the intended offense – murder . . . – are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor must know and share the murderous intent of the actual perpetrator." (*People v. McCoy, supra*, 25 Cal.4th at p. 1118.) Accordingly, Leslie could be found guilty of first degree murder only if the jury believed he had the necessary mental state, an intent to kill. (*Ibid.*)

Leslie argues that the "trial court never instructed the jury that aiding and abetting liability requires specific intent" and "no instruction told jurors appellant had to harbor the specific intent to aid and abet the killing of Nieves." He is incorrect. The instruction on murder stated that the perpetrator was guilty of first degree murder if he acted willfully, deliberately, and with premeditation. It further stated that "[t]he defendant acted willfully if he intended to kill." CALCRIM No. 401 advised that, to be guilty as an

aider and abettor, Leslie had to have known that the perpetrator intended to commit the crime, i.e., murder, and "intended to aid and abet the perpetrator in committing the crime." If a defendant knows the perpetrator intends to commit murder, and intends to aid the perpetrator in committing the murder, the aider and abettor necessarily intends to kill. Further, the instruction reiterated that one "aids and abets a crime if he knows of the perpetrator's unlawful purpose and he *specifically intends to*" aid in commission of the crime. (Italics added.) It is difficult to conceive a circumstance under which a defendant who knows the perpetrator intends to kill, and specifically intends to aid in the murder, could himself lack the intent to kill. " 'When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." [Citation.]' [Citation.]" (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1118.) CALCRIM No. 401 adequately apprised the jury of the intent requirement.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.